No. 88-961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL L. SCHMIDT,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Whether the Georgia Court of Appeals, by finding that the facts and circumstances presented here established probable cause for the petitioner's arrest, has completely abrogated any Fourth Amendment protection afforded motorists traveling on interstate highways through the State of Georgia.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

The petitioner, Michael L. Schmidt, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Georgia entered in this proceeding on July 7, 1988.

OPINION BELOW

The opinion of the Court of Appeals of Georgia, reported at 372 S.E. 2d 440 (Ga. App. 1988), appears in the Appendix hereto. No opinion was rendered by the Supreme Court of Georgia in denying petitioner's petition for Writ of Certiorari to that Court.

JURISDICTION

The judgment of the Court of Appeals of Georgia, affirming petitioner's conviction dated September 24, 1987, was entered on the 7th day of July, 1988. The Court of Appeals denied a timely motion for rehearing on July 28, 1988. Thereafter, on September 16, 1988, the Georgia Supreme Court denied a petition for Writ of Certiorari. A timely motion for rehearing was denied by the Supreme Court on October 5, 1988. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code, Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

During the early morning hours of November 4, 1986, Georgia State Trooper Michael Ralston observed a 1986 Ford Thunderbird, with Illinois plates, driven by the petitioner, Michael Schmidt, traveling northbound on Interstate 75. Because the vehicle was allegedly traveling at 64 miles per hour in a 55 mile per hour speed zone, at approximately 2:18 a.m., Trooper Ralston stopped the vehicle for speeding. The petitioner exited his vehicle and, upon the trooper's request, produced a valid Illinois driver's license and a rental agreement for the automobile. The petitioner was informed that he had been stopped for *speeding*.

At this time Mr. Schmidt stated that he was a college student in Illinois, and that he had traveled to Florida to purchase a car because he had heard they were cheaper in Florida. According to Trooper Ralston, Mr. Schmidt only mentioned traveling to the Tampa and Orlando areas in search of a new car. Ralston admitted, however, that at the preliminary hearing he testified that Schmidt "made the trip specifically to the Tampa area and some other parts of Florida." Moreover, the warrant affidavit, prepared by Ralston at the time of the stop, indicated that Mr. Schmidt had visited "Tampa and other parts of Florida to look for a personal vehicle."

After issuing a written warning for the alleged speeding violation, with the aid of his flashlight, Trooper Ralston visually observed the interior of petitioner's vehicle. In the rear of the passenger compartment, he saw a pillow, a blanket, a small travel bag, and some fast food trash (there were two roadmaps on the front seat). Then,

though admittedly having seen no contraband in the car, Trooper Ralston asked Schmidt's consent to search the car ". . . because of the suspicion I had that it may be possible that a crime would be afoot."

Although indicating that he was in a hurry, Schmidt verbally consented to the search and signed a written consent to search form at 2:30 a.m. Schmidt sat in the rear of the patrol car while Ralston searched Schmidt's vehicle. Ralston recovered two roadmaps with alternate routes between Miami and Chicago highlighted in yellow. He found two motel bills, one of which indicated that Schmidt had stayed (in his own name) in a Miami hotel from October 31 to November 3. He also found the aforementioned blanket, pillow, travel bag, fast food trash, and saw a radar detector on the dash. Ralston then removed the ignition key, exited the vehicle and tried to open the trunk.

When that key failed to open the trunk, Ralston asked Schmidt if he had the key. Though claiming that Schmidt told him it was the only key he had been given, Ralston admitted that at the preliminary hearing he testified that Schmidt "merely stated he did not have a key to the trunk." When Ralston advised Mr. Schmidt that he wished to search the trunk by removing the back seat, Schmidt withdrew his consent. The whole process, from signing the consent form to revocation of consent, took ten to fifteen minutes. Ralston honored the request not to remove the back seat of the rental vehicle, but advised Schmidt that he would have to be detained until the arrival of a drug detection dog and a magistrate.

The drug dog and his handler arrived approximately thirty minutes after Mr. Schmidt had revoked his consent to search. According to Leroy Green, the handler, they arrived at 3:11 a.m. Though Trooper Ralston claimed that

"the dog or handler would not have been allowed to have gone into the vehicle," and could not recall leaving the doors open, both Green and Schmidt clearly stated that the dog's head entered the car through the open door on the passenger side of the car, and alerted to the rear seat area. After the alert by the drug dog was added to the affidavit for search warrant, the warrant was signed at the scene by the magistrate at 3:35 a.m. Shortly thereafter, a large quantity of cocaine was discovered in the trunk of the car.

The petitioner filed a pretrial motion to suppress evidence seized from the rented automobile he was driving on November 4, 1986. That motion raised four separate bases for suppression. After considering the evidence presented, the arguments of counsel, and a brief submitted on petitioner's behalf, the trial court, without making factual findings of any kind, ruled:

> "Now, this Court finds Trooper Ralston's stop of Defendant's vehicle to be a valid stop; and, further, that Defendant freely and voluntarily consented to the search of his vehicle. Therefore, the Defendant's Motion to Suppress Evidence is denied."

After the denial of the motion, a waiver of petitioner's right to a jury trial, and the parties' stipulations to the transcript of the motion to suppress and to the lab report (which indicated that the substance recovered from the petitioner's trunk was 4002 grams of cocaine), the petitioner was convicted, sentenced to 25 years imprisonment, and fined $500,000.

Petitioner's conviction was affirmed by a sharply divided* Georgia Court of Appeal. The Court of Appeals first ruled

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* Four justices joined the opinion of the Court, one justice concurred in the judgment and four justices dissented.

that holding petitioner for thirty minutes awaiting the arrival of a drug detection dog was *not* a valid detention pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny, *Schmidt*, 372 S.E. 2d at 442-43. The Court went on, however, to rule that Trooper Ralston had reasonable cause to believe that the petitioner was transporting contraband *prior* to the arrival of the drug detection dog, and therefore, that the seizure and subsequent search was valid. *Schmidt*, 372 S.E. 2d at 443.

Petitioner's subsequent requests for relief in both the Court of Appeals and the Supreme Court of Georgia, as previously set forth in the jurisdictional statement, were denied.

The petitioner now comes before this Honorable Court, respectfully submitting that the decision below does greivous injury to the protections afforded *all* citizens by the Fourth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW HAS SO GROSSLY EXPANDED THE DEFINITION OF PROBABLE CAUSE, THEREBY CONFLICTING WITH NEARLY EVERY DECISION BY THIS COURT DELINEATING THAT CONCEPT, SO AS TO VITIATE THE PROTECTION AFFORDED EVERY CITIZEN BY THE FOURTH AMENDMENT.

The proscription of the Fourth Amendment against unreasonable searches and seizures was meant to protect each and every citizen from arbitrary intrusions into their privacy and personal autonomy. The fundamental nature

of this absolute right cannot be questioned. *See Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L. Ed. 734 (1891). Moreover, as this Court stated in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L. Ed. 2d 660 (1978), one does not forfeit his Fourth Amendment rights when he steps off the sidewalks into his automobile.

Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even strong reason to suspect" was not adequate to support a warrant for arrest, *Dunaway v. New York*, 442 U.S. 200, 212, 99 S.Ct. 2248, 2256, 60 L. Ed. 2d 824 (1978). Probable cause exists only where, based upon objective facts and circumstances, a man of reasonable caution would believe that a crime has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L. Ed. 1879 (1949). A detention unsupported by probable cause is unlawful, and evidence subsequently discovered by the search cannot be used to validate the probable cause judgment upon which the illegality of the search depends. *Whitely v. Warden*, 401 U.S. 560, 567, 91 S.Ct. 1031, 28 L. Ed. 2d 306 (1970).

In the instant case, the Georgia Court of Appeals held that the detention of the petitioner, between the time he withdrew his consent and the arrival of the drug detection dog was not a valid *Terry* stop. Even if there had been an articulable basis for a brief investigative detention, the prolonged duration of the detention exceeded the type of intrusion sanctioned by *Terry*. *Schmidt*, 372 S.E. 2d at 442. The Court of Appeals then concluded, however, that after the petitioner withdrew his consent, probable cause for his arrest existed, thereby validating the seizure and subsequent search.

On what basis did the Court of Appeals come to this remarkable conclusion? The Court stated:

> "Ralston knew that defendant was heading north after spending several days in Miami, a known drug source city; that he made a prior trip to Miami in the summer; that he made numerous calls from Miami to Chicago; and, most importantly, that he lied about his whereabouts. He also knew that certain statements made by defendant *sounded fishy*. Defendant said he was unemployed and that he was looking to purchase an automobile in Florida because they could be purchased cheaper there. Yet, the defendant was driving an expensive rental automobile and he had rented an automobile previously. Defendant said he was a student. Yet, he was traveling at a time when students are usually in school and he was taking a week off to drive to Miami. Moreover, defendant's statement that he was only given one key by the rental company was an obvious excuse to prevent Ralston from opening the trunk."

Schmidt, 372 S.E. 2d at 443. (Emphasis added).

It must be remembered, however, that before the Court of Appeals determined that these facts constituted probable cause to arrest, *no one* connected with this case ever considered that possibility.

Trooper Ralston, a ten year veteran of the Georgia Department of Public Safety (including seven years as a state trooper), with all of his experience using "drug interdiction" profiles, knew that he did not have probable cause to arrest Michael Schmidt until after the drug detection dog alerted. That is why the dog and the magistrate were summoned in the first place. Had there been probable cause to arrest, the dog or a magistrate would not have been necessary. The car could have been searched on the basis of probable cause, *United States v. Ross*, 456 U.S.

798, 102 S.Ct. 2157, 72 L. Ed. 2d 572 (1982), or as a search incident to a lawful arrest, *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L. Ed. 2d 768 (1981), or as an inventory search, *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L. Ed. 2d 1000 (1976). Trooper Ralston knew, however, that he did not have probable cause to arrest the petitioner at the time consent to search was withdrawn.

The magistrate, called to the scene by Trooper Ralston, knew that probable cause to arrest did not exist in this case until *after* the drug detection dog alerted. No arrest warrant ever issued, and the search warrant was not signed until *after* the alert. The District Attorney in this case has at no time argued that Trooper Ralston had probable cause prior to the drug detection dog's alert. Nor did the trial court ever suggest the existence of probable cause prior to the alert.

Yet, on the basis of facts insufficient for the law enforcement officer on the scene, insufficient for the magistrate on the scene, insufficient for the District Attorney, and insufficient for the trial court, four judges on the Court of Appeals somehow concluded that Trooper Ralston had probable cause to arrest the petitioner at the time he withdrew his consent to search. Trash in the back seat and "fishy" statements to an officer simply do not constitute probable cause to arrest within the meaning of that phrase under the Fourth Amendment.

This Court has held that law enforcement officers may rely on courier profiles in deciding whether to approach a suspect and ask questions or seek consent to search. But matching a profile, even in conjunction with an attempt to disassociate from a colleague will not in and of itself permit law enforcement officers to engage in a *Terry*

stop. *Reid v. Georgia*, 448 U.S. 438 (1980). Even if the suspect courier is clearly engaged in evasive conduct and says, "let's get out of here," only a brief investigative *Terry* stop is justified. *Florida v. Rodriguez*, 469 U.S. 544, 552-54 (1980) (Burger, C.J., Powell, J. and Blackmun, J., concurring). The profile, however, even when supplemented by suspicious statements and evasive conduct has never authorized a full-scale arrest. *See, e.g., Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L. Ed. 229 (1983).

The factors and circumstances relied upon by the Court of Appeals *may* create suspicion, particularly among agents "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L. Ed. 436 (1948), but in the case *sub judice*, those factors and circumstances were not sufficient to establish probable cause to detain petitioner until the arrival of a magistrate and a drug sniffing dog. Mere suspicion that a search will reveal contraband does not satisfy the requirement of probable cause.

The simple truth of the matter is that each factor upon which Trooper Ralston relied, while not inconsistent with a criminal course of conduct, was certainly not inconsistent with an innocent course of conduct. Trooper Ralston plainly and simply admitted that he did not have probable cause to detain Michael Schmidt when he testified at the motion to suppress:

> "All of these characteristics combined as a whole, not only, you know, just necessarily one item that you see, but as a whole, after these have been combined and added up, then they can determine, or for me be a *reason for suspicion.*" (Emphasis added).

The detection of crime is the function of law enforcement agents, while providing justice according to law is the function of the judiciary. The perception of each is

fashioned by the purpose served by each. It must therefore be, from time to time, as here, that what to an officer is probable cause is to a judge but an unreasonable hunch. Here, it was not the arresting officer's, but the Court of Appeals whose unreasonable hunch is being questioned. If permitted to stand, the decision below removes completely from the Fourth Amendment, as applied to the states by the Fourteenth Amendment, the requirement of probable cause. The petitioner respectfully urges this Honorable Court grant his Petition for Writ of Certiorari and consider the important issues raised by this appeal.

Respectfully submitted,

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APPENDIX

[372 S.E.2d 440 (Ga. App. 1988)]

SCHMIDT

v.

The STATE.

No. 76062.

Court of Appeals of Georgia.

July 7, 1988.

Rehearing Denied July 28, 1988.

Certiorari Denied Sept. 16, 1988.

Defendant was convicted in the Gordon Superior Court, White, J., of trafficking in cocaine, and he appealed. The Court of Appeals, McMurray, P.J., held that: (1) 30-minute detention of defendant, after he was stopped for speeding and withdrew consent to search of his vehicle following officer's expression of desire to search trunk, constituted arrest, but (2) arrest was supported by probable cause.

Affirmed.

Beasley, J., concurred specially and filed opinion.

Benham, J., dissented and filed opinion in which Carley and Sognier, JJ., joined.

McMURRAY, Presiding Judge.

Defendant was convicted of trafficking in cocaine and he appealed. Via four assignments of error, he challenges the trial court's denial of his motion to suppress evidence.

The evidence adduced at the motion to suppress hearing, viewed in favor of the State, is summarized as follows: In the early morning hours of November 4, 1986, Georgia

State Trooper Ralston observed a 1986 Thunderbird with an Illinois license plate heading northbound on Interstae 75. The automobile was travelling at 64 m.p.h. (the speed limit was 55 m.p.h.) so Ralston stopped it. The time was 2:18 a.m.

Defendant exited the automobile and stepped to the rear. He was advised he had been speeding and was asked to produce a driver's license and vehicle registration. Defendant gave Ralston a valid Illinois license; he also gave him a rental agreement for the Thunderbird.

Defendant told Ralston he was unemployed; that he was a college student in northern Illinois; and that he was returning from central Florida where he had gone to purchase an automobile. (Ralston testified that defendant told him he had been to Tampa and Orlando.) In this regard, defendant told Ralston that automobiles could be bought cheaper in Florida and that was why he went there.

Examining the rental agreement, Ralston observed that defendant rented the Thunderbird on October 29, 1986, and that was not the first automobile he had rented. He also noticed that the rental price of the automobile was $290 per week (plus 25 cents per mile after the first 200 miles per day) and that defendant put down a $300 cash deposit on the automobile.

Looking through the car windows, Ralston saw two road maps, a blanket and pillow, a small travelbag and fast food trash. He also observed a radar detector on the dash.

Ralston gave defendant a written warning for the speeding violation. He returned the driver's license and rental agreement to defendant.

Defendant was asked if he would give his consent to a search of the automobile. Although he said he was in a hurry, defendant gave oral permission for a search. The defendant signed a written consent to search form. The form was signed at 2:30 a.m.

Searching the automobile, Ralston obtained the road maps and found two motel bills. On the road maps, the

route from Chicago to Miami was highlighted. One motel bill showed that defendant stayed in Miami from October 31 until November 3, 1986, and that defendant made more than 20 telephone calls to Chicago during his stay. The other motel bill showed that defendant was in Miami for two days during the previous summer and that he made several calls to Chicago at that time.

Ralston removed the key from the ignition and went to open the trunk. The ignition key did not fit and Ralston asked defendant for the key to the trunk. According to Ralston, defendant replied that he was given only one key by the rental agency.

Ralston testified that in his experience, whenever a suspect failed to produce a key to the trunk, narcotics were ultimately found. (See, e.g., *Smith v. State*, 184 Ga.App. 304, 306, 361 S.E.2d 215.) Accordingly, Ralston pressed on, indicating that he was going to remove the rear seat to search the trunk. Defendant objected, expressing concern about the taking apart of a rental automobile.

Ralston explained that he could remove the rear seat simply, in a matter of minutes. Nevertheless, defendant withdrew his consent to search. Then, Ralston advised defendant that he would have to be detained until the arrival of a drug dog and a magistrate. Because defendant was not dressed warmly, Ralston suggested that he wait in the patrol car. Defendant did so. In Ralston's mind, defendant was no longer free to leave. The time was 2:45 a.m.

Approximately a half hour later, a drug dog and handler arrived. A magistrate was already on the scene. When the dog alerted, the magistrate executed a warrant to search the automobile. In short order, a large quantity of cocaine was discovered in the trunk. *Held:*

The fact that defendant was speeding authorized the initial stop by Ralston. *Minor v. State*, 180 Ga.App. 869, 870, 350 S.E.2d 783. The search of the interior of the rental automobile after the stop was performed legally pursuant to defendant's voluntary consent. *Smith v. State*,

184 Ga.App. 304(1), 361 S.E.2d 215, supra. When defendant revoked his consent, Ralston terminated the search as he was bound to do. See *Conley v. State*, 180 Ga.App. 662, 664, 350 S.E.2d 45. At that point, defendant was no longer free to leave. Was he justifiably detained or was he arrested?

In *Radowick v. State*, 145 Ga.App. 231, 237, 244 S.E.2d 346, the police received a lookout message for a truck with a camper on the back. When the vehicle was spotted, a police officer stopped it. Defendants were told they were suspected of transporting contraband and they were asked for permission to search the vehicle. Defendants did not say "yes," and they did not say "no." It was suggested that defendants wait in the patrol car. They were not free to leave. While defendants were detained, other officers arrived. They did not have a consent to search form. Finally, after defendants were detained over 40 minutes a consent to search form was secured and defendants executed it. On appeal, this court ruled that the detention of defendants went beyond the minimal intrusion authorized by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889, and amounted to an arrest.

In the case sub judice, defendant was detained for 30 minutes while the officer waited for the arrival of a drug dog and magistrate. During that period of time, defendant was not free to leave. As in *Radowick v. State*, 145 Ga.App. 231, 244 S.E.2d 346, supra, the detention of defendant constituted an arrest.

To say that the detention of defendant was a justifiable *Terry* stop stretches the imagination. After all, defendant had already been stopped and investigated. He produced identification, answered questions, and consented to a search of the interior of his automobile. Thus, the 30-minute detention of defendant by Ralston constituted an arrest. *Radowick v. State*, 145 Ga.App. 231, 244 S.E.2d 346, supra.

The State principally relies upon *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974), to support its conten-

tion that the detention of defendant did not constitute an arrest. In that case, the defendant consented to a search of his personal belongings on board an airplane suspected of being used to smuggle drugs. During the course of the search, a drug dog was called in. The dog alerted to marijuana and the defendant was arrested. Defendant was detained for an hour before his formal arrest. It was held that the defendant's detention did not amount to an arrest.

Richards is inapplicable. At no point in time did Richards withdraw his consent to search. In the case sub judice, on the other hand, it is clear that defendant's consent to search form was withdrawn and that defendant was detained nevertheless.

"Detention beyond that authorized by *Terry* [*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889] is an arrest and, to be constitutional, such an arrest must be supported by probable cause. [Cit.]" *Williams v. State*, 251 Ga. 749, 792, 312 S.E.2d 40. Having determined that defendant was arrested after he withdrew his consent to search, we must decide whether Ralston had probable cause to make the arrest.

"A 'warrantless arrest' is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the accused had committed or was committing an offense. [Cits.]" *Callaway v. State*, 257 Ga. 12, 13(2), 14, 354 S.E.2d 118. See *Quinn v. State*, 132 Ga.App. 395, 396(1), 208 S.E. 2d 263. Thus, we look to the facts and circumstances to see if they warranted the conclusion that defendant was committing a crime at the moment he was arrested by Ralston. In so doing, we must bear in mind that probable cause concerns probabilities: " '. . . They are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' (Cit.)" *Sanders v. State*, 235 Ga. 425, 440, 219 S.E.2d 768.

Ralston knew that defendant was heading north after spending several days in Miami, a known drug source city; that he made a prior trip to Miami in the summer; that he made numerous calls from Miami to Chicago; and, most importantly, that he lied about his whereabouts. He also knew that certain statements made by defendant sounded fishy. Defendant said he was unemployed and that he was looking to purchase an automobile in Florida because they could be purchased cheaper there. Yet, defendant was driving an expensive rental automobile and he had rented an automobile previously. Defendant said he was a student. Yet, he was travelling at a time when students are usually in school and he was taking a week off to drive to Miami. Moreover, defendant's statement that he was only given one key by the rental company was an obvious excuse to prevent Ralston from opening the trunk.

(At this juncture we note the State's contention that probable cause is also supported by defendant's withdrawal of consent at the moment when Ralston evidenced a willingness to remove the rear seat of the automobile. We decline to view the exercise of a constitutional right as a factor in determining probable cause. Accordingly, we have given no weight to the withdrawal of consent in making our probable cause determination.)

In our view, the particular facts and circumstances of the case sub judice were sufficient to establish probable cause for an arrest. Ralston was warranted in believing that defendant was transporting contraband in the trunk of the rental automobile. See *Reid v. State*, 179 Ga.App. 144, 345 S.E.2d 635. If follows that defendant was arrested legally and that the evidence subsequently seized was neither tainted nor inadmissible. See *Still v. State*, 149 Ga.App. 792, 256 S.E.2d 133. The trial court did not err in overruling defendant's motion to suppress evidence.

JUDGMENT AFFIRMED.

DEEN and BANKE, P.JJ., and POPE, J., concur.

BEASLEY, J., concurs specially.

BIRDSONG, C.J., and CARLEY, SOGNIER and BENHAM, JJ., dissent.

BEASLEY, Judge, concurring specially.

I agree that the officer did not offend the Federal Constitution by further detaining the defendant for a short time to await the dog. *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). The investigatory purpose of this brief restriction of defendant's freedom was authorized under the circumstances. The dog's reaction would either confirm or fail to confirm the officer's belief that defendant possessed drugs in the car trunk. In the event of the latter, Schmidt would be free to leave. In the event of the former, probable cause for the search would exist, and no one disputes that probable cause for his arrest would also be present.

Although I would agree with the majority's declining to view an exercise of the constitutional right to refuse to consent to a search, as a factor in determining probable cause, that is not exactly the situation here. Schmidt's partial withdrawal rendered his consent selective. As the encounter unfolded, his relinquishment of a constitutional right became limited, and that later restriction of the permission in my opinion may legitimately be considered as an additional factor warranting the further investigation and necessitating the extension of the detention.

BENHAM, Judge, dissenting.

While I am in full accord with the majority's determinations that appellant withdrew his consent to search and that his detention became an arrest, I cannot support the conclusion that the arrest was supported by probable cause to believe that appellant was committing a crime.

"Probable cause to arrest exists where, based on objective facts and circumstances, a man of reasonable caution would believe that a crime has been or is being committed.

[Cit.]" *Williams v. State*, 251 Ga. 749, 792(8)(a)(ii), 312 S.E. 2d 40 (1983). The question is whether, at the time appellant was arrested, "the objective facts known to the officer would justify issuance of a . . . warrant. . . ." *Love v. State*, 254 Ga. 697, 698, 334 S.E.2d 173 (1985). That an unemployed college student rents a car in northern Illinois in late October-early November, travels to southern Florida, makes telephone calls back to Illinois, and does not have a key to the trunk of his rental automobile does not lead a person of reasonable caution to believe that a crime is being committed. Too many unjustified conclusions have to be reached before one can say with any degree of certainty that the officer's suspicions of illegal activity evolved into probable cause to arrest. The fact that appellant was an unemployed student does not justify the conclusion that he could not afford to rent the car he was driving. Perhaps he was independently wealthy; perhaps his parents agreed to finance his trip to find an automobile. The fact that appellant was not attending classes for a week in mid-autumn does not justify the conclusion that he was engaged in illegal drug activity. Perhaps his school was closed for some type of break; perhaps appellant was engaged in some kind of independent study program. Even if classes were in session, if the fact that a college student skips school for a week to go to Florida constitutes probable cause to believe that he is engaged in illegal activity, then all young people driving cars with out-of-state tags in a beach area are subject to arrest. The officer in the case at bar, well trained in drug interdiction, detained appellant because he had *suspicions* and wanted a drug-sniffing dog to confirm those suspicions. It was only after the dog alerted to the presence of contraband that the officer applied to the attending magistrate for a warrant. Thus, in the officer's mind, he did not have the requisite probable cause to arrest appellant until the drug dog alerted, some 50 minutes after the officer had, in fact, arrested appellant.

"This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of

detecting crime and apprehending criminals, and it will uphold them in the most vigilant legal discharge of all their duties, but it utterly repudiates the doctrine that these important duties cannot be successfully performed without the use of illegal and despotic means. It is not true that in the effort to detect crime and to punish the criminal, 'the end justifies the means.' This is especially not true when the means adopted are violative of the very essence of constitutional free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant [or probable cause]. Suspicion is no substitute for a legal warrant, and the badge of authority is the emblem of law and order, and gives no right to the wearer to arrest without warrant [and] imprison without authority." *Underwood v. State*, 13 Ga. App. 206, 213, 78 S.E. 1103 (1913).

I respectfully dissent from the affirmance of the trial court's denial of appellant's motion to suppress.

I am authorized to state that Judge CARLEY and Judge SOGNIER join in this dissent.

[Dated August 14, 1987]

IN THE
SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	Indictment No. 4839
	)	
VS.	)	Charge: Trafficking In Cocaine
	)	
MICHAEL L. SCHMIDT, Defendant.	)	

ORDER ON MOTION TO SUPPRESS

A Motion To Suppress Evidence having been filed by the defendant, and the same having come on for Hearing on May 6, 1987; and evidence having been presented by both the State and the defendant; and after careful and conscientious consideration by the Court of all evidence presented, argument of counsel and brief submitted by Counsel for the Defendant:

NOW, this Court finds Trooper Ralston's stop of defendant's vehicle to be a valid stop; and, further, that defendant freely and voluntarily consented to the search of his vehicle. Therefore, defendant's Motion To Suppress Evidence is denied.

SO ORDERED, this 14th day of August, 1987.

/s/ JERE F. WHITE
Jere F. White
Judge, Superior Courts
Cherokee Judicial Circuit